

NOT FOR PUBLICATION**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE JOYCE ANN GILCHRIST,
Debtor.

BAP No. WO-03-095

JOYCE ANN GILCHRIST,
Appellant,

Bankr. No. 02-19914-NLJ
Chapter 7

v.

ORDER AND JUDGMENT*

JOHN T. HARDEMAN, Trustee, and
GARY D. HAMMOND, Trustee,
Appellees.

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before CLARK, NUGENT, and McNIFF, Bankruptcy Judges.

McNIFF, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

The Debtor/Appellant, Joyce Ann Gilchrist, (Debtor) timely appeals the order of the United States Bankruptcy Court for the Western District of Oklahoma denying her motion to dismiss her Chapter 13 case and granting the motions of

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

John T. Hardeman (Hardeman) and Gary D. Hammond (Hammond) to convert the Chapter 13 case to a Chapter 7 case for cause pursuant to 11 U.S.C. § 1307(c).¹ The Debtor asserts that Hammond did not have standing in the bankruptcy court to seek conversion of her Chapter 13 case. She also contends the bankruptcy court abused its discretion in converting, rather than dismissing her case.

Appellate Jurisdiction

A bankruptcy appellate panel, with the consent of the parties, has jurisdiction to hear timely-filed appeals from final judgments, orders, and decrees of bankruptcy courts within the circuit. 28 U.S.C. § 158(a)-(c)(1); Fed. R. Bankr. P. 8002(a). The Bankruptcy Appellate Panel has jurisdiction over this timely-filed appeal. A bankruptcy court's order converting a Chapter 13 case to a case under Chapter 7 is a final, appealable order under 28 U.S.C. § 158(a)(1). *In re Miller*, 303 B.R. 471, 472 (10th Cir. BAP 2003) (order denying conversion from a Chapter 7 to Chapter 13 is a final order); *In re Vista Foods U.S.A., Inc.*, 202 B.R. 499, 500 (10th Cir. BAP 1996) (per curiam) (order converting Chapter 11 case ends discrete controversy and is final order). Furthermore, the parties have consented to this Court's jurisdiction by not electing to have this appeal heard by the United States District Court for the Western District of Oklahoma.

Background

While employed as a forensic chemist, the Debtor participated in her employer's retirement plan established under 26 U.S.C. § 401(k). In 2001, when her employment ended, she withdrew the 401(k) funds (Pension Funds) from the plan and deposited them in a money market account.

The Debtor filed her voluntary Chapter 7 petition for relief on October 3,

¹ On February 12, 2004, the Appellees filed a second Application to File Response Brief Out of Time. On February 24, 2004, the Appellant filed an objection and a Motion to Strike. The motions were referred to this panel by Order dated February 26, 2004. The Appellees' motion to file their brief out of time is granted, and the Appellant's Motion to Strike is denied.

2002. Hammond was appointed the Chapter 7 trustee. The Debtor did not disclose the Pension Funds in her original bankruptcy schedules, but she did disclose the Pension Funds to Hammond at the initial meeting of creditors.

Hammond filed a motion for turnover of the Pension Funds. He also employed the law firm of Groom & Hammond, P.C. (G&H) as counsel for the trustee in the Debtor's case. The bankruptcy court approved that employment on January 2, 2003.

On January 21, 2003, prior to the Debtor filing a response, the bankruptcy court granted the motion for turnover (Turnover Order). The Debtor filed a motion to vacate the Turnover Order, and many months later, the bankruptcy court denied the motion. The Debtor did not appeal the Turnover Order or the order denying her motion to vacate.

However, in response to the Turnover Order, the Debtor amended her bankruptcy schedules to list the Pension Funds and to claim an exemption in them. Hammond objected. Hammond also filed a Complaint for Injunctive Relief against the Debtor seeking an injunction prohibiting her from depleting the Pension Funds. On March 21, 2003, the bankruptcy court granted Hammond's motion for a ten-day temporary restraining order to prevent irreparable injury to the estate. Subsequently, the bankruptcy court entered an order enjoining the Debtor from using the Pension Funds (Injunction) pending a determination of the exemption question. The Debtor did not appeal the Injunction.

After entry of the Injunction, the Debtor moved to convert her Chapter 7 case to a Chapter 13 case. The motion was granted on April 23, 2003. Hardeman became the trustee of the Chapter 13 case. The Debtor filed a Chapter 13 plan, which made no reference to the Pension Funds. However, she proposed to make a lump sum payment of \$2,000, which apparently was to be made from the Pension Funds. Hardeman objected to confirmation of the plan, but for whatever reason, a hearing was not held.

In June 2003, G&H filed a motion for an order allowing its attorney fees as an administrative expense. Hardeman objected to the hourly rate charged by G&H, and the bankruptcy court allowed the fees in a reduced amount (Fee Order). The Debtor did not object to the allowance of the attorney fees and did not appeal the Fee Order.

On September 8, 2003, the bankruptcy court denied the Debtor's motion to vacate the Injunction. Shortly after that, the Debtor filed a motion to dismiss her Chapter 13 case. Both Hardeman and Hammond objected and moved the court to reconvert the case to a Chapter 7 case. In their pleadings, Hardeman and Hammond detailed the history of the case, the Debtor's failure to initially disclose the Pension Funds, the five-month delay in which the Debtor had not obtained confirmation of her Chapter 13 plan, and the Debtor's default in plan payments resulting in a delinquency of about \$3,000. Both trustees argued that conversion to a Chapter 7 case was in the best interests of the creditors.

The bankruptcy court held a hearing on the motion, a transcript of which is not in the appellate record. The bankruptcy court denied the motion to dismiss and converted the case to a Chapter 7 case (Conversion Order). In the Conversion Order, in lieu of findings and conclusions, the bankruptcy court ruled that a reconversion was "in the best interest of the creditors for the reasons stated in the Objections filed by the Chapter 7 Trustee and Chapter 13 Trustee." The Debtor timely appealed from the Conversion Order. At the time of the appeal, the exemption issue was unresolved.

Standard of Review

The decision to dismiss or convert a Chapter 13 case for cause is within the sound discretion of the bankruptcy court and is reviewed for an abuse of discretion. *In re Armstrong*, 303 B.R. 213, 218 (10th Cir. BAP 2004). Under the abuse of discretion standard, the appellate court will not disturb the trial court's decision unless it has a definite and firm conviction that the lower court made a

clear error of judgment or exceeded the bounds of permissible choice. *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994). The jurisdiction of the bankruptcy court is a question of law reviewed *de novo*. *Jones v. Bank of Santa Fe (In re Courtesy Inns, Ltd., Inc.)*, 40 F.3d 1084, 1085 (10th Cir. 1994).

Discussion

The court concludes Hammond had standing to object to the Debtor's Motion to Dismiss and concludes the bankruptcy court did not abuse its discretion when it converted the Debtor's Chapter 13 case to a case under Chapter 7. Therefore, we affirm.

Standing

Pursuant to § 1307(b), if a Chapter 13 case has not been converted previously, a debtor has a right to dismiss the case. However, the Debtor's case had been previously converted under § 706. Accordingly, the section applicable to this case is § 1307(c). That section states, in relevant part:

on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including

(1) unreasonable delay by the debtor that is prejudicial to creditors;

. . .

(4) failure to commence making timely payments under section 1326 of this title;

11 U.S.C. § 1307(c).

The Code does not define the phrase "party in interest." In the case of *In re Davis*, 239 B.R. 573, 579 (10th Cir. BAP 1999), this Court ruled that the phrase includes "all persons whose pecuniary interests are directly affected by the bankruptcy proceedings," and includes anyone who has an interest in the property to be administered and distributed in the estate. In a more recent case, this Court

ruled that the trustee of a prior Chapter 11 case had standing to bring a motion to dismiss a subsequently filed Chapter 13 case. *In re Armstrong*, 303 B.R. at 219.

In this case, Hammond's law firm was a creditor of the estate, and Hammond was also the prior Chapter 7 trustee. Thus, Hammond had standing in the bankruptcy court to argue for conversion rather than dismissal of the Debtor's Chapter 13 case.

Conversion

Under § 1307(c), on a finding of cause, the court may dismiss or convert a Chapter 13 case to a case under Chapter 7, whichever is in the best interests of the creditors. The list of factors constituting cause under § 1307(c) is not exclusive.

Here, the bankruptcy court based its decision on the Debtor's default in payments, the resulting arrearage of approximately \$3,000, and the Debtor's delay in obtaining confirmation of her Chapter 13 plan. On those grounds alone, either dismissal or conversion was justified. 11 U.S.C. § 1307(c)(1) & (4).

The bankruptcy court also considered the existence of the Pension Funds in Hardeman's possession, and the possibility that the creditors would not be paid from those funds if the case were dismissed. Reconverting the case to a Chapter 7 case on that basis was not clear error or an abuse of discretion.

Nevertheless, the Debtor contends she was unable to properly fund her Chapter 13 plan because the bankruptcy court's Injunction prevented her from contributing the Pension Funds to payments under the plan. The argument is without merit for two reasons. First, the record on appeal contains no evidence to support the Debtor's assertion that the bankruptcy court refused to allow her to contribute the Pension Funds to her plan. The burden of providing an adequate record for review is on the appellant. *In re Armstrong*, 294 B.R. 344, 361 (10th Cir. BAP 2003).

Second, even if the Debtor's contentions were supported by the record, the

Injunction was only one factor considered by the bankruptcy court when it reconverted the case to a Chapter 7 case. Ample evidence of other factors exists to support the bankruptcy court's decision.

The Debtor also contends the Fee Order is an interlocutory order that should be reversed. The Debtor did not timely file a notice of appeal or motion for leave to appeal an interlocutory order as required by Fed. R. Bankr. P. 8001(b) and Fed. R. Bankr. P. 8003. *See Cobb v. Lewis (In re Lewis)*, 271 B.R. 877, 887 (10th Cir. BAP 2002) (court may grant leave to appeal interlocutory order if timely notice of appeal or motion for leave to appeal is filed). The Court will not review the Fee Order.

Conclusion

The bankruptcy court did not commit clear error or abuse its discretion in determining that the Debtor's Chapter 13 case should be reconverted to a Chapter 7 case for cause. For the reasons stated, the bankruptcy court's order is AFFIRMED.